

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

<p>STATE OF OKLAHOMA,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>TYSON FOODS, INC., et al.,</p> <p style="text-align: center;">Defendants.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Case No. 05-cv-329-GKF(PJC)</p>
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**STATE OF OKLAHOMA'S REPLY IN SUPPORT OF ITS
MOTION FOR PROTECTIVE ORDER (DKT #1990)**

Plaintiff, the State of Oklahoma, respectfully submits this as its reply supporting its Motion for Protective Order (DKT #1990) regarding the two subpoenas issued by the Tyson Defendants on the discovery cut-off date (April 16, 2009) and returnable well after the discovery date (May 4, 2009).

Discussion

Pursuant to the Federal Rules of Civil Procedure¹, the State moved for a protective order regarding the two subpoenas issued by the Tyson Defendants on the final day of the discovery period to universities in Florida seeking information about one of the State's expert witnesses. The subpoenas seek production of documents after the close of discovery.

The Tyson Defendants seek to avoid the authority of this Court's ruling in *Oldenkamp v. United American Ins. Co.*, 2008 WL 5082696 (N.D. Okla. Nov. 26, 2008) because, in their view, the opinion "does not contain any legal analysis or citations to legal authorities," and they claim quite possibly this Court "was simply making a finding that was specific to the district court's interpretation of its own scheduling order." *See* Brief, p. 4. The State believes that this Court is

¹ Fed.R.Civ.P. 26(c)(1) confers upon a party standing to move for a protective order for a subpoena directed toward document production from a third party. *Butcher v. Allstate Ins. Co.*, 2008 WL 4965288, *2 (S.D.Miss., Nov. 18, 2008).

uniquely situated to interpret its own orders, and did so correctly in *Oldenkamp*. In that case the Court held that subpoenas seeking document production after the discovery deadline were untimely, and granted a protective order against them. *Oldenkamp*, 2008 WL 5082696, *2. This result comports with common sense and the requirement that discovery be scheduled to be completed before the discovery cutoff.

The cases relied upon by the Tyson Defendants do not assist them, and the Tyson Defendants cite no case supporting the proposition that the issuance of subpoenas on the last day of the discovery period for return thereafter is proper. In *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683, 683 (D. Kan. 1995), the court found the scheduling order date limiting service of Rule 34 requests for production of documents did not affect the issuance of a subpoena *duces tecum*, but also found the subpoena was defective and could not be enforced. *Smith* thus has no bearing on the present case.

In this Court's earlier case of *Rice v. United States*, 164 F.R.D. 556, 558 (N.D. Okla. 1995), the Court quashed a subpoena unquestionably issued *after* the discovery cutoff and stated that "by setting a discovery deadline the Court intended to limit the time during which the parties could serve discovery requests or invoke the Court's subpoena power to obtain documents from third parties." The Tyson Defendants speculate that the Court meant that a party could "invoke" the Court's subpoena power by issuing a subpoena before the cutoff which was not returnable until after that date. *See* Brief, p. 5. However, the opinion in *Rice* did not need to reach that issue because the subpoena at issue in that case was issued *after* the cutoff, and the Court's *dictum* should not be assumed to have meant a party could *begin* the invocation of the subpoena power within the discovery period and *complete* that invocation afterward. To so assume is

unjustified, and unnecessarily creates a conflict between this Court's opinions in *Oldenkamp* and *Rice*.

The argument of the Tyson Defendants concerning the State's discovery does not justify their use of the challenged subpoenas. Thirty days before the discovery cutoff, *and in conformance with the parties' course of conduct in this litigation that responses to discovery served electronically were due thirty days thereafter*, the State served interrogatories and requests for production of documents on Defendants. The Tyson Defendants electronically served their discovery requests on the thirtieth day, as did some other Defendants. The Cargill Defendants served their responses four days later. Only the Georges Defendants refused to respond claiming the discovery was untimely. While the Tyson Defendants made objections to the State's discovery, they did not object that it was untimely, and they provided some substantive information in response to the State's discovery. Consequently the Tyson Defendants waived any objection to the timeliness of the State's discovery. *See* Fed. R. Civ. P. 33(b)(4).

Conclusion

The State respectfully asks the Court to issue a protective order invalidating the two untimely subpoenas issued to the Florida universities in this matter.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
ATTORNEY GENERAL
Kelly H. Burch OBA #17067
J. Trevor Hammons OBA #20234
Daniel P. Lennington OBA #21577
ASSISTANT ATTORNEYS GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/Robert A. Nance

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
David P. Page OBA #6852
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis W. Bullock OBA #1305
Robert M. Blakemore OBA 18656
BULLOCK, BULLOCK & BLAKEMORE
110 West Seventh Street Suite 707
Tulsa OK 74119
(918) 584-2001

Frederick C. Baker
(admitted *pro hac vice*)
Lee M. Heath
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice*)
MOTLEY RICE, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent
(admitted *pro hac vice*)
Michael G. Rousseau
(admitted *pro hac vice*)
Fidelma L. Fitzpatrick
(admitted *pro hac vice*)
MOTLEY RICE, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Daniel P. Lennington, Assistant Attorney General	daniel.lennington@oag.ok.gov

M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	

Louis Werner Bullock	lbullock@bullock-blakemore.com
Robert M. Blakemore	bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE	

Frederick C. Baker	fbaker@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth C. Ward	lward@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com

MOTLEY RICE, LLC
Counsel for State of Oklahoma

Robert P. Redemann rredemann@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.

David C. Senger david@cgmlawok.com

Robert E Sanders rsanders@youngwilliams.com
Edwin Stephen Williams steve.williams@youngwilliams.com

YOUNG WILLIAMS P.A.
Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.

John H. Tucker jtucker@rhodesokla.com
Theresa Noble Hill thill@rhodesokla.com
Colin Hampton Tucker ctucker@rhodesokla.com
Leslie Jane Southerland ljsoutherland@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

Terry Wayen West terry@thewestlawfirm.com
THE WEST LAW FIRM

Delmar R. Ehrich dehrich@faegre.com
Bruce Jones bjones@faegre.com
Krisann C. Kleibacker Lee kkleee@faegre.com
Todd P. Walker twalker@faegre.com
Christopher H. Dolan cdolan@faegre.com
Melissa C. Collins mcollins@faegre.com
FAEGRE & BENSON, LLP

Dara D. Mann dmann@mckennalong.com
MCKENNA, LONG & ALDRIDGE LLP
Counsel for Cargill, Inc. & Cargill Turkey Production, LLC

James Martin Graves jgraves@bassettlawfirm.com
Gary V Weeks gweeks@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
K. C. Dupps Tucker kctucker@bassettlawfirm.com
BASSETT LAW FIRM

George W. Owens gwo@owenslawfirmnpc.com
Randall E. Rose rer@owenslawfirmnpc.com
OWENS LAW FIRM, P.C.

Counsel for George's Inc. & George's Farms, Inc.

A. Scott McDaniel	smcdaniel@mhla-law.com
Nicole Longwell	nlongwell@mhla-law.com
Philip Hixon	phixon@mhla-law.com
Craig A. Merkes	cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC	

Sherry P. Bartley	sbartley@mws gw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC	

Counsel for Peterson Farms, Inc.

John Elrod	jelrod@cwlaw.com
Vicki Bronson	vbronson@cwlaw.com
P. Joshua Wisley	jwisley@cwlaw.com
Bruce W. Freeman	bfreeman@cwlaw.com
D. Richard Funk	rfunk@cwlaw.com
CONNER & WINTERS, LLP	

Counsel for Simmons Foods, Inc.

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.	

Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Thomas C. Green	tcgreen@sidley.com
Gordon D. Todd	gtodd@sidley.com
SIDLEY, AUSTIN, BROWN & WOOD LLP	

Robert W. George	robert.george@tyson.com
L. Bryan Burns	bryan.burns@tyson.com
TYSON FOODS, INC	

Michael R. Bond	michael.bond@kutakrock.com
Erin W. Thompson	erin.thompson@kutakrock.com
Dustin R. Darst	dustin.darst@kutakrock.com
KUTAK ROCK, LLP	

Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.

R. Thomas Lay
KERR, IRVINE, RHODES & ABLES
Frank M. Evans, III
Jennifer Stockton Griffin
David Gregory Brown
LATHROP & GAGE LC
Counsel for Willow Brook Foods, Inc.

rtl@kiralaw.com
fevans@lathropgage.com
jgriffin@lathropgage.com

Robin S Conrad
NATIONAL CHAMBER LITIGATION CENTER

rconrad@uschamber.com

Gary S Chilton
HOLLADAY, CHILTON AND DEGIUSTI, PLLC
Counsel for US Chamber of Commerce and American Tort Reform Association

gchilton@hcdattorneys.com

D. Kenyon Williams, Jr.
Michael D. Graves
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON
Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.

kwilliams@hallestill.com
mgraves@hallestill.com

Richard Ford
LeAnne Burnett
CROWE & DUNLEVY
Counsel for Oklahoma Farm Bureau, Inc.

richard.ford@crowedunlevy.com
leanne.burnett@crowedunlevy.com

Kendra Akin Jones, Assistant Attorney General
Charles L. Moulton, Sr Assistant Attorney General
Counsel for State of Arkansas and Arkansas National Resources Commission

Kendra.Jones@arkansasag.gov
Charles.Moulton@arkansasag.gov

Mark Richard Mullins
MCAFEE & TAFT
Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen

richard.mullins@mcafeetaft.com

Mia Vahlberg
GABLE GOTWALS

mvahlberg@gablelaw.com

James T. Banks
Adam J. Siegel
HOGAN & HARTSON, LLP

jtbanks@hhlaw.com
ajsiegel@hhlaw.com

Counsel for National Chicken Council; U.S. Poultry and Egg Association & National Turkey Federation

John D. Russell
FELLERS, SNIDER, BLANKENSHIP, BAILEY
& TIPPENS, PC

jrussell@fellerssnider.com

William A. Waddell, Jr.
David E. Choate
FRIDAY, ELDREDGE & CLARK, LLP

waddell@fec.net
dchoate@fec.net

Counsel for Arkansas Farm Bureau Federation

Barry Greg Reynolds
Jessica E. Rainey
TITUS, HILLIS, REYNOLDS, LOVE,
DICKMAN & MCCALMON

reynolds@titushillis.com
jraine@titushillis.com

Nikaa Baugh Jordan
William S. Cox, III
LIGHTFOOT, FRANKLIN & WHITE, LLC

njordan@lightfootlaw.com
wcox@lightfootlaw.com

Counsel for American Farm Bureau and National Cattlemen's Beef Association

Also on this 29th day of April, 2009 I mailed a copy of the above and foregoing pleading to:

David Gregory Brown
Lathrop & Gage LC
314 E HIGH ST
JEFFERSON CITY, MO 65101

Thomas C Green
Sidley Austin Brown & Wood LLP
1501 K ST NW
WASHINGTON, DC 20005

Dustin McDaniel
Justin Allen
Office of the Attorney General (Little Rock)
323 Center St, Ste 200
Little Rock, AR 72201-2610

Steven B. Randall

58185 County Road 658
Kansas, Ok 74347

Cary Silverman

Victor E Schwartz

Shook Hardy & Bacon LLP (Washington DC)
600 14TH ST NW STE 800
WASHINGTON, DC 20005-2004

George R. Stubblefield

HC 66, Box 19-12
Proctor, Ok 74457

J.D. Strong

Secretary of the Environment
State of Oklahoma
3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

/s/Robert A. Nance